

BEFORE THE
POSTAL REGULATORY COMMISSION
WASHINGTON, D.C. 20268-0001

ANNUAL COMPLIANCE REVIEW, 2019

Docket No. ACR2019

**UNITED STATES POSTAL SERVICE RESPONSE TO UNITED PARCEL SERVICE
INC.'S MOTION REQUESTING ACCESS TO NON-PUBLIC MATERIALS UNDER
PROTECTIVE CONDITIONS**
(January 22, 2020)

For the reasons described below, the United States Postal Service ("Postal Service") opposes in part the Motion Requesting Access to Non-Public Materials under Protective Conditions ("UPS Motion") filed in this docket by the United Parcel Service, Inc. ("UPS").¹

First, disclosure of the non-public information included in USPS-FY19-NP2, USPS-FY19-NP3, USPS-FY19-NP7, USPS-FY19-NP8, USPS-FY19-NP9, USPS-FY19-NP9A, USPS-FY19-NP14, USPS-FY19-NP30, and USPS-FY19-NP32 – even under the protective conditions proposed – would place commercially-sensitive information at risk, including that of third parties. The Postal Service therefore opposes UPS access to those non-public folders in part for the same reasons that it opposed the similar UPS motion a year ago.² However, the Postal Service acknowledges that the Postal

¹ United Parcel Service, Inc.'s Motion Requesting Access to Non-Public Materials under Protective Conditions, Docket No. ACR2019 (January 15, 2020).

² See United States Postal Service Response to United Parcel Service Inc.'s Motion Requesting Access to Non-public Material under Protective Conditions, Docket No. ACR2018 (January 28, 2019). The folders at issue contain information of a commercial nature, which under good business practice would not be publicly disclosed. As such, this information normally would be exempt from mandatory public disclosure pursuant to 39 U.S.C. § 410(c)(2) and 5 U.S.C. § 552(b)(3), (b)(4). The Postal Service further incorporates by reference its arguments, and the identified harms that would arise from disclosure of these materials, which are contained in the Postal Service's application for non-public treatment in this

Regulatory Commission (“Commission”) has granted UPS access to some similar folders in past years over the Postal Service’s opposition.³ To the extent that the basis for the Postal Service’s own opposition to the present UPS motion is the same as the basis for last year’s opposition, and though the Postal Service does not agree with those past rulings, those issues have been litigated in this forum.

Second, and notwithstanding the Postal Service’s acknowledgment of the Commission’s adverse rulings over the Postal Service’s past opposition, the Postal Service maintains that the UPS motion should be denied because of the continuing objections of affected third parties, including foreign postal operators. As noted above, the non-public folders at issue contain commercially-sensitive third party information. It is especially difficult for foreign entities with logistical, legal, and language obstacles to participate timely and directly in Commission proceedings, even when receiving notice of the instant motion. However, the UPS motion places their commercial data at an unfair competitive risk. Despite the only one-week deadline under the Commission’s rules for responses to this motion,⁴ some third parties have submitted letters expressing their objections to the UPS motion. The Postal Service has attached three of these letters from the designated postal operators of Canada (Canada Post Corporation), Germany (Deutsche Post), and the United Kingdom of Great Britain and Northern Ireland (Royal Mail Group) and urges the Commission to reconsider its past rulings at least to the extent that the present UPS motion seeks third party data.⁵

docket. See USPS FY2019 ACR, Attachment Two, Application of the United States Postal Service for Nonpublic Treatment of Materials.

³ E.g., Order Granting Motions for Access, Order No. 4998, Docket No. ACR2018 (February 8, 2019).

⁴ 39 C.F.R. § 3007.301(c).

⁵ See Attachments 1-3.

Third, the Postal Service opposes the UPS motion to the extent that it further seeks an extension of its prior access to non-public library references from Docket Nos. ACR2014, ACR2015, ACR2016, ACR2017, and ACR2018 which was granted previously by the Commission during proceedings within those earlier ACR dockets. The Postal Service expressly declined to contest that aspect of last year's UPS motion,⁶ and thus the Commission has not already adjudicated that aspect of the present UPS motion on its substantive merits. For the reasons that follow, the Postal Service now opposes that aspect of the present UPS motion.

The extension that UPS now seeks in this Docket No. ACR2019 is inconsistent with the terms by which the Commission granted UPS access in different, past dockets. In particular, the requested extension is inconsistent with the Commission's rules of practice and the certified protective order conditions. Because the access granted in the past cases was subject to those specific terms that conflict with the requested extension, the new requested extension that UPS filed years later should be denied.

The present motion is submitted pursuant to 39 C.F.R. §§ 3007.301, 3007.304. The Commission promulgated those rules in June 2018; the orders granting prior access to non-public library references in Docket Nos. ACR2014, ACR2015, ACR2016, and ACR2017 were issued pursuant to the Commission's predecessor rules, including 39 C.F.R. §§ 3007.50, 3007.51. Rule 3007.51(a), as it existed when such access was granted for compliance proceedings, specified that "[a]ccess to non-public materials

⁶ See United States Postal Service Response to United Parcel Service Inc.'s Motion Requesting Access to Non-public Material under Protective Conditions, Docket No. ACR2018 (January 28, 2019) at 3 n.4; see also United States Postal Service Response to United Parcel Service Inc.'s Motion Requesting Access to Non-public Material under Protective Conditions, Docket No. ACR2017 (January 12, 2018) at 2 n.3. The UPS motions in the ACR2014, ACR2015, and ACR2016 dockets did not request such access. As this is the third consecutive year that UPS seeks such extended access, it appears that UPS is now seeking this extended access on a routine annual basis, which as explained above should not be granted.

obtained under § 3007.50 terminates either **when the Commission issues its next Annual Compliance Determination (ACD)** or the person withdraws or is otherwise no longer involved in the relevant proceeding, whichever occurs first.⁷ Upon such termination, the Commission's rules further provided that "all non-public materials in a person's possession must be destroyed, and the form attached to the protective conditions certifying destruction must be executed and filed with the Commission."⁸

In other words, the Commission's rules that enabled UPS to gain access in the first place in the prior compliance dockets were clear that access to such materials should routinely end with the Commission's issuance of its respective ACD for that year. Limited exceptions may be warranted under special circumstances,⁹ but that is not what the present UPS motion seeks. Instead, the UPS motion anticipates continued access to those non-public materials routine for years to come (to compare new data each year with all prior years), such that any interested persons could seek to review all compliance materials from all years on an ongoing basis and with no end. That is

⁷ Former rule 3007.51(a) (emphasis added). In promulgating the final new rules in June 2018, the Commission explained that its unification of rules 3007.40(a) and 3007.50(a) was solely for "simplicity" and was not intended to "product a material difference in procedures." Order Adopting Final Rules Relating to Non-public Information, Order No. 4679, Docket No. RM2018-3 (June 27, 2018) at 66; see also *id.* at 70 (combining rules 3007.41 and 3007.51 on termination of access). In other words, combining the procedures for access to non-public materials in compliance matters and in other matters was solely for simplicity; accordingly, the Commission's issuance of its Annual Compliance Determination (ACD) as specified in the predecessor rule 3007.51(a) remains the relevant "final order or report" for purposes of the successor rule 3007.304(a) for ACR dockets (compliance proceedings). Indeed, if that were not so, it would render that aspect of the rule meaningless in the compliance cases, as there then would be no relevant final order or report for ACR dockets.

⁸ Former rule 3007.51(c). It is not clear that UPS has always submitted all of the required certifications of destruction in each of the ACR dockets at issue. If not, then that is an additional basis on which the Commission should deny the present UPS motion in its entirety. See, e.g., 39 C.F.R. § 3007.303.

⁹ Continued access could be permitted only by motion under protective conditions. UPS has occasionally filed such motions in the past, which highlight their exceptional nature and limited scope and duration. See, e.g., United Parcel Service, Inc.'s Motion Requesting Continued Access to Non-Public Materials under Protective Conditions, Docket No. ACR2014 (March 27, 2015) (seeking continued access to a specific subset of compliance materials for continued use in the same docket and only for an additional 90-day period).

contrary to both the letter and spirit of the Commission's rules on which the access was originally granted. To turn such open-ended continued access every year into the routine practice would eviscerate the clear intent of the Commission's rules, which instead made the issuance of the Commission's ACD the ordinary end to the access. The UPS motion (and presumably others like it in every subsequent year in the future) would replace the rule with the exception.

In accord with the Commission's rules, the Commission's past orders granting access to non-public materials in the ACR dockets, and the certifications submitted by UPS, were premised on certain protective conditions. Those protective conditions included the requirements that the information to which non-public access was afforded would be used only for purposes of that particular ACR docket. The protective conditions that the Commission ordered, and that UPS representatives certified, did not permit any use in future dockets, let alone routine use in all future compliance dockets year after year. Indeed, if that had been the case, then all persons whose sensitive data were at risk in those earlier dockets might have lodged additional concerns with the Commission at the time. To allow the requested expansion of use now would retroactively modify the protective conditions that were the premise for the original requests, but without adequate, advance notice and an opportunity to comment.¹⁰

¹⁰ For example, the Postal Service has entered into various bilateral contracts with foreign postal operators in the past for the exchange of mail flows on negotiated rates and other terms. Some of those bilateral contracts have since expired, such that the data filed in the non-public folders in the ACR 2019 docket would not necessarily encompass information about the earlier expired contracts. Data relevant to those contractual mail flows would have been included within ACR filings in past years. Such third-party foreign postal operators may have had the opportunity to voice any concerns about access to its commercially sensitive data implicated by past motions for access to non-public materials in particular dockets. Yet those past motions, and the orders granting them, were premised on the limited use of such data only for purposes of each respective ACR docket. They were never given notice at the time that their data would also be exposed to access years later; to the contrary, as discussed above, the

For the foregoing reasons, the Postal Service respectfully urges the Commission to deny the UPS motion to the extent stated above.

Respectfully submitted,

UNITED STATES POSTAL SERVICE
By its attorney:

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Commission's rules indicated that the routine practice would be to terminate the access each year upon the Commission's issuance of its respective ACD.



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Attachment 1 to USPS Response

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Via electronic mail

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Re. Motion for Access to Non-public Material Containing Third Party Information in PRC Docket No. ACR2019

Dear Mr. Rackow,

Canada Post Corporation (CPC) appreciates the efforts of USPS to oppose those elements of the above Motion pertaining to third-party information. Given the magnitude of the parcel flows between USPS and CPC; and the highly competitive nature of the United States/Canada cross-border parcels business; and the seriousness and significance of the impact on CPC's revenues and legitimate commercial interests of improper disclosure of its commercially-sensitive information, which CPC strongly believes would not be adequately protected by the Protective Conditions proposed by the above Motion, especially considering the lack of enforcement tools for CPC; CPC most emphatically supports USPS' position requesting the PRC to order that access should be denied to the non-public material set forth in PRC Docket No. ACR2019.

Thank you.

Joanna Hatt
Senior Legal Counsel, Canada Post Corporation

JH/dlr

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Via electronic mail

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January 22, 2020

Re: Opposition to Motion for Access to Non-public Material Containing Third Party Information on Deutsche Post Shipments

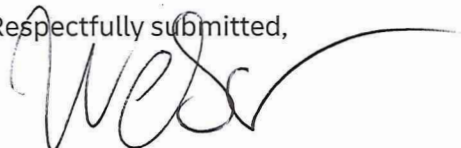
Dear Mr. Meyerson:

I am writing to you today to express Deutsche Post's opposition to a motion that United Parcel Service, Inc. ("UPS") filed with the Postal Regulatory Commission ("PRC") as part of PRC docket ACR2019. UPS is seeking access to a non-public file that includes third-party data associated with postal shipments between USPS and Deutsche Post. Deutsche Post opposes granting access to this data because it fears that the data will not be adequately protected and that Deutsche Post will have no tools to ensure that the two entities comply with the proposed protective procedures.

The data that UPS is seeking may impact the highly competitive nature of the international parcel business, including the international parcel business between the United States and Germany. Deutsche Post is primarily concerned that the release of this data to UPS will negatively impact U.S. and German postal customers because the requested file contains sensitive market data on the movement of packages between the two postal operators. Further, release of this information could affect the competitive market with other postal providers in the trade lane, thereby distorting competition and causing financial harm. Therefore, Deutsche Post opposes UPS' motion.

Deutsche Post greatly appreciates your efforts on this matter.

Respectfully submitted,



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21 January 2020

Dear Mr Alverno

Royal Mail Response to UPS Motion (filing 111869, dated 15 January 2020) in the Postal Review Commission's Annual Compliance review 2019

I write on behalf of Royal Mail Group Limited (Royal Mail), the UK's Designated Postal Operator for UPU purposes and the UK's universal postal service provider.

Royal Mail has reviewed the motion lodged by UPS (filing 111869, dated 15 January 2020) in the Annual Compliance Review 2019 (the "Motion"). The Motion requests access to certain non-public materials contained with the USPS FY2019 Annual Compliance Report filed by USPS with the Postal Regulatory Commission in December 2019.

Royal Mail objects to the Motion and asks that the Postal Review Commission does not permit the disclosure sought.

This is because, Royal Mail submits, the data is highly commercially sensitive and disclosure of the information is likely to have a detrimental effect on Royal Mail as it will provide postal industry competitors (of which UPS is one) with information that could harm Royal Mail's legitimate commercial interests. There is intense competition in the delivery of mail to and from the UK, including relative to the US.

Royal Mail's competitors do not and should not have access to data concerning the exchange of postal articles, packets and parcels by and between Royal Mail and USPS, including information about volumes, types, weights, sizes, costs, charges, revenues, discounts, delivery timetables, performance targets and measurements and/or customer details.

It should also be noted that UPS lodged a similar motion last year, which was granted, releasing equivalent material for the preceding 12-month period. As a result, disclosure this year will enable trend analysis to be conducted, further jeopardising the business of Royal Mail.



Though the Motion seeks disclosure for named individuals only it says that the outside counsel will use the information to assist UPS in making informed comments in the Commission's 2019 Annual Compliance Determination Proceeding. There is therefore a risk that though the actual data is not shared, the comments which are derived from it allow extrapolation which discloses the detail of the data to UPS and, perhaps, others.

The Motion seeks to suggest that UPS and its advisors cannot provide comments to the PRC upon USPS's annual filing without access to this information, but does not explain what additional work this information will enable. Royal Mail also does not understand the need for UPS's advisors to access this information to comment on the compliance determination and does not consider that the Motion adequately deals with this question.

Royal Mail therefore, respectfully requests that the Motion is not granted and that the information sought is not provided to UPS or its outside counsel and consultants.

Please do let us know if we can assist further.

Yours Sincerely

For and on behalf of Royal Mail Group Limited

A handwritten signature in black ink, appearing to read 'Rina', with a stylized flourish at the end.

Rina Newman

Solicitor